1795. ticulars, or to amplify the reaſons, ſince I continue clearly in my opinion on the point, which was ſeparately argued, that this cauſe is excluſively of Admiralty juriſdiction. On that ground I chuſe entirely to reſt the judgment that I give: but it leads inevitably, alſo, to another concluſion, that, the Court not having juriſdiction, a *Venire Facias de novo* (which, in effect, directs the exerciſe of juriſdiction) ought not to iſſue. I am, therefore, for pronouncing, ſimply, a judgment of reverſal.

PATERSON, *Juſtice.* I cannot agree to ſend a *Venire Facias de novo* to a Court, which, in my opinion, has no juriſdiction to try, or to decide, the cauſe.

CUSHING, *Juſtice.* I ſhall give no opinion upon the queſtion of affirming, or reverſing, the Judgment of the Court below. My brethren think there is error in the proceedings; and they are right to rectify it. On the queſtion, however, of awarding a *Venire Facias de novo*, I agree with Judge IREDELL: But, as the Court are equally divided, the Writ cannot iſſue.

Judgment reverſed; but no writ of *Venire Facias de novo* was awarded.

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## The UNITED STATES *verſus* Judge LAWRENCE.

A MOTION was made by the Attorney General of the United States *(Bradford)* for a Rule to ſhew cauſe why a *Mandamus* ſhould not be directed to JOHN LAWRENCE, Judge of the Diſtrict of *New-York*, in order to compel him to iſſue a warrant, for apprehending Captain *Barre*, commander of the frigate *Le Perdrix*, belonging to the French Republic.

The caſe was this:—Captain *Barre*, ſoon after the diſperſion of a *French* convoy on the *American* coaſt, voluntarily abandoned his ſhip, and became a reſident in *New-York*. The Vice-Conſul of the *French Republic*, thereupon, made a demand, in writing, that Judge *Lawrence* would iſſue a warrant to apprehend Captain *Barre*, as a deſerter from *Le Perdrix*, by virtue of

of the 9th Article of the Conſular Convention between the *United States* and *France*, which is expreſſed in theſe words: 1795.

"ART. 9. The Conſuls and Vice-Conſuls may cauſe to be arreſted the Captains, Officers, Mariners, Sailors, and all other perſons, being part of the crews of the veſſels of their reſpective nations, who ſhall have deſerted from the ſaid veſſels, in order to ſend them back and tranſport them out of the country. For which purpoſe, the ſaid Conſuls and Vice-Conſuls ſhall addreſs themſelves to the Courts, Judges, and Officers competent, and ſhall demand the ſaid deſerters in writing, proving by an exhibition of the regiſter of the veſſel, or ſhip's roll, that thoſe men were part of the ſaid crews; and on this demand, ſo proved, (ſaving, however, where the contrary is proved) the delivery ſhall not be refuſed; and there ſhall be given all aid and aſſiſtance to the ſaid Conſuls and Vice-Conſuls for the ſearch, ſeizure, and arreſt, of the ſaid deſerters, who ſhall even be detained and kept in the priſons of the country, at their requeſt and expence, until they ſhall have found an opportunity of ſending them back; but if they be not ſent back within three months, to be counted from the day of their arreſt, they ſhall be ſet at liberty, and ſhall be no more arreſted for the ſame cauſe." 2 *Vo.* 392.

To the Vice-Conſul's demand the Judge anſwered, "that it was, in his opinion, neceſſary, before a warrant could iſſue, that the applicant ſhould prove by the regiſter of the ſhip, or *Role d'Equipage*, that Captain *Barre* was, in fact, one of the crew of *Le Perdrix*." The Vice-Conſul replied, "that the ſhip's regiſter was not in his poſſeſſion; but, at the ſame time, ſtated various reaſons why he ſhould be admitted to produce collateral proof of the fact in queſtion, inſtead of being obliged to exhibit the ſhip's regiſter itſelf; and declared, that in ſuch caſe, he would give the judge all the proof that could be deſired." The Judge perſevering in his original opinion on the ſubject, that "the mode of proof mentioned in the 9th article of the Convention was the only legitimate one, and that he could not diſpenſe with it;" the Vice-Conſul obtained a copy of the *Role d'Equipage*, certified by the *French* Vice-Conſul at *Boſton*, under the Conſular ſeal; and tranſmitted it to the Judge, with another demand for a warrant to arreſt Capt. *Barre*; contending that this copy was entitled to the ſame reſpect as the original inſtrument, by virtue of the 5th article of the Convention, which is in theſe words:

"ART. 5. The Conſuls and Vice-Conſuls reſpectively ſhall have the excluſive right of receiving in their chancery, or on board of veſſels, the declarations and all the other acts, which the Captains, Maſters, Crews, Paſſengers, and Merchants of their nation may chuſe to make there, even their teſtaments and her diſpoſals by laſt will: And the copies of the ſaid acts, du-

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1795. ly authenticated by the said Consuls or Vice-Consuls, under the seal of their Consulate, shall receive faith in law, equally as their originals would, in all the tribunals of the dominions of the Most Christian King, and of the *United States*. They shall also have, and exclusively, in case of the absence of the testamentary executor, administrator, or legal heir, the right to inventory, liquidate and proceed to the sale of the personal estate left by subjects or citizens of their nation, who shall die within the extent of their Consulate; they shall proceed therein with the assistance of two merchants of their said nation, or for want of them, of any other at their choice, and shall cause to be deposited in their chancery, the effects and papers of the said estates; and no officer, military, judiciary, or of the police of the country, shall disturb them or interfere therein, in any manner whatsoever: but the said Consuls and Vice-Consuls shall not deliver up the said effects, nor the proceeds thereof, to the lawful heirs, or to their order, till they shall have caused to be paid all debts which the deceased shall have contracted in the country; for which purpose the creditors shall have a right to attach the said effects in their hands, as they might in those of any other individual whatever, and proceed to obtain sale of them till payment of what shall be lawfully due to them. When the debts shall not have been contracted by judgment, deed, or note, the signature whereof shall be known, payment shall not be ordered but on the creditor's giving sufficient surety, resident in the country, to refund the sums he shall have unduly received, principal, interest and costs; which surety nevertheless shall stand duly discharged, after the term of one year in time of peace, and of two in time of war, if the demand in discharge cannot be formed before the end of this term against the heirs who shall present themselves. And in order that the heirs may not be unjustly kept out of the effects of the deceased, the Consuls and Vice-Consuls shall notify his death in some one of the gazettes published within their Consulate, and they shall retain the said effects in their hands four months to answer all demands which shall be presented; and they shall be bound after this delay to deliver to the persons succeeding thereto, what shall be more than sufficient for the demands which shall have been formed." 2 *Vol.* 384.

The Judge, however, declared that "he did not consider the copy of the register, to be the kind of proof designated by the 9th article of the Convention; and that till the proof specified by the express words of the article was exhibited, he could not deem himself authorised to issue a warrant for apprehending Captain *Barre*."

Under these circumstances, the Minister of the *French Republic* applied to the Executive of the *United States*, complaining

ing of the Judge's refuſal to iſſue a warrant againſt Captain *Barre*, as a manifeſt departure from the poſitive proviſions of the Conſular Convention; and the preſent motion was made, in order to obtain the opinion of the Supreme Court, upon the ſubject, for the ſatisfaction of the Miniſter. 1795.

The rule was oppoſed by *Ingerſoll and W. Tilghman*, who contended, I. That the original regiſter of the veſſel, or ſhip's *Roll*, was the only admiſſible evidence under the 9th article of the Convention; and II. That in the preſent caſe the Judge has, in fact, given a judgment; and although a *mandamus* will lie to compel the Judge of an inferior Court, to proceed to give judgment, it will not lie to preſcribe what judgment he ſhall give.

I. The treaty has placed the ſubject in controverſy upon a footing different from the law of nations; for, independent of poſitive compact, no Government will ſurrender deſerters, or fugitives, who make an aſylum of its territory. This, then, is a new law introductory of a new remedy; and whenever a new remedy is ſo introduced, (more eſpecially in a caſe ſo highly penal) it muſt be ſtrictly purſued. 1 *Wil.* 164. 4 *Bac. Abr.* 647, 651. The 9th article of the Conſular Convention, may therefore, be conſidered in a twofold point of view—1ſt. As to the true conſtruction of the words:—and 2d. As to the competency of a copy of the regiſter, or ſhip's *Roll*, to be received in evidence, by any analogy to the common law rules of evidence.—1ſt. The words of the article are full and expreſs, that the Conſul ſhall prove the deſerters, whoſe arreſt he demands, to be part of the ſhip's crew, "by an exhibition of the regiſter of the veſſel, or ſhip's *Roll.*" If thoſe, who drew the inſtrument, and appear throughout to have perfectly underſtood the import of the words they uſed, had not intended to fix a ſpecific mode of proof, a ſpecific mode would not have been mentioned in this caſe; but the kind of evidence would have been left at large, as in the 14th article, where, in another caſe, proof of citizenſhip is to be made, "*by legal evidence.*" But, in fact, the ſhip's *Roll* is the beſt evidence which the nature of the caſe admits; and, if any other, is allowed, it muſt depend upon the mere diſcretion of the Judge. The *individuals* of the *French* nation, as well as the *Republic*, are intereſted in the conſtruction of the article; ſince it deprives them of that protection within our territory, to which they would otherwiſe be entitled; and their intereſt becomes peculiarly important, when we conſider the exiſting circumſtances of the nation. Beſides, whatever inconveniency might flow from this ſtrict conſtruction, if it is the genuine, fixed, meaning of the treaty, the court cannot change it on that account. 4 *Bac. Abr.* 652, 10 *Mod.* 344. The inconveniences, however, are aggravated beyond

1795. beyond their real force. The caſes contemplated, were, obviouſly, caſes of deſertion before the veſſel left the port, in which it would always be eaſy to exhibit the regiſter, before a warrant was iſſued. The act of Congreſs, veſting this juriſdiction in the Diſtrict Judges, may, indeed, be too reſtricted, inaſmuch as it does not give each Diſtrict Judge a power to iſſue his warrant to all parts of the *United States*, by which the neceſſity of applying to the Judge of every Diſtrict, into which a deſerter might eſcape, and the conſequent neceſſity of exhibiting the original *Roll* on every ſuch application, would be avoided. The inconveniences ſuggeſted might therefore be obviated by Congreſs; and even the government of *France* might introduce a remedy, by directing the original *Roll* in caſes of deſertion, to be depoſited with the Conſul, and certified copies to be furniſhed to the Captains of the reſpective ſhips. But it is contended, that admitting the exhibition of the original *Roll* to be requiſite, ſtill it is ſufficient to exhibit it *before the perſon is delivered*;—it need not be exhibited *before the warrant iſſues to arreſt him.* This, however, cannot be the true conſtruction of the article, upon a fair analyſis of its different parts. In the firſt part *the arreſt* of deſerters only is mentioned, "in order to ſend them back and tranſport them out of the country;"—then, it is ſaid, "*for which purpoſe* (that is, for the purpoſe of the *arreſt*) the Conſuls and Vice-Conſuls ſhall addreſs themſelves to the Courts, Judges, and Officers competent, and ſhall demand the ſaid deſerter in writing, *proving by an exhibition of the regiſter, or ſhip's roll*, that thoſe men were part of the crew, &c. and the clauſe of delivery follows, providing, that "on this demand, ſo proved, the delivery ſhall not be refuſed." On what, then, is the Judge to ground his warrant, if not on the exhibition of the roll? There is no other proof mentioned in the article; and, certainly, proof of ſome kind muſt be made, before the warrant iſſues. "No warrants ſhall iſſue (ſays the 6th article of the amendment to the Federal Conſtitution) but upon probable cauſe, ſupported by oath, or affirmation;" And in this caſe, if previous proof has been made, there is nothing to prevent the warrant's containing a clauſe of immediate delivery; ſince the deſerter is only to be committed and impriſoned at the inſtance of the Conſul.—2d. If, then, an exhibition of the ſhip's roll is neceſſary, the ſecond conſideration, ariſing on the conſtruction of the article, is, whether by analogy to the common law rules of evidence, a copy ought to be received, inſtead of the original. It is a general rule, that the copy of a deed, or other extraneous proof of its contents, cannot be given in evidence, unleſs it is firſt ſhewn that the original did once exiſt, and that it had been deſtroyed or loſt, or is in the poſſeſſion of the adverſe party. 1 *Vez.* 389. *Eſp. Dig.* 780. 782. 10 *Co.*

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92. In the preſent caſe, the only requiſite of the rule that is ſatisfied, eſtabliſhes the exiſtence of the roll; but proves, at the ſame time, that it has not been loſt or deſtroyed, and that it is (or at leaſt that it was when the warrant was applied for) in the poſſeſſionof the Conſul at *Boſton*. So ſtrictly has the rule been adhered to, that even the acknowledgment of the obligor will not be received as evidence that a bond was executed by him; the ſubſcribing witneſs muſt be produced. *Doug.* 205. 4 *Burr.* 2275. As to the inference drawn by the Conſul, from the 5th article of the Convention, in ſupport of a copy of the Roll as competent evidence, the article clearly relates to matters tranſacted by Conſuls in virtue of their ſpecified conſular powers, but not to the authentication of foreign inſtruments, deeds, or commiſſions. 1795.

II. But whatever may be the opinion of this court on the conſtruction of the article in queſtion, they cannot interpoſe by *mandamus*, to compel the Diſtrict Judge to adopt their judgment, inſtead of his own, as the rule of deciſion, in a caſe judicially before him. The Supreme Court may, it is true, iſſue writs of *mandamus*, in caſes warranted *by the principles and uſages of law*; (1 *Vol. p.* 58. *f.* 14.) but there is no uſage or principle of law to warrant the iſſuing of a *mandamus* in a caſe like the preſent. By the Act of Congreſs (2 *Vol. p.* 56. the Diſtrict Judge is appointed the competent judge, for the purpoſes expreſſed in the 9th article of the Convention; the Conſul applied to him as ſuch; and the Judge refuſed to iſſue his warrant, becauſe, in his opinion, the evidence required by the article was not produced. The act of iſſuing the warrant is *judicial*, and not *miniſterial*; and the refuſal to iſſue it for want of legal proof, was the exercíſe of *a judicial* authority. Where any other court has *competent juriſdiction*, the court will not interfere by *mandamus* to controul it. *Eſp. Dig.* 668. 4 *Burr.* 2295. In a variety of caſes the ſtreſs is laid on the act being *miniſterial*, and not *judicial*. 1 *Wilſ.* 125. 283. *Eſp. Dig.* 662. 663. 666. 669. 512. 552. 530. 1 *Stra.* 113. 392. 1 *Vent.* 187. *T. Raym.* 214. 1 *Bl. Rep.* 640. 3 *Bac. Abr.* 531. 1 *Burr.* 131. 4 *Com. Dig* 207. 208. *Carth.* 450. 2 *Stra.* 835. *Sayre's Rep.* 160. It is juſtly ſaid, however, that a writ of *mandamus* ought in all caſes to be granted, where the law has provided no ſpecific remedy, though on the principles of juſtice and good government, there ought to be one. *Eſp. Dig.* 661. 4 *Com. Dig.* 205. And, it has been generally ſaid, that writs of *mandamus* are either to reſtore a perſon deprived of ſome corporate, or other franchiſe, or right; or to admit a perſon legally entitled. 3 *Burr.* 1267. 2 *Burr.* 1043. or (upon a more extenſive baſis) to prevent a failure of juſtice, to enforce the execution of the common law, and to effectuate ſome ſtatute:

1795. tute: but it has never been allowed as a private remedy for a party, except in cases arising on the 9 *Ann. c.* 20. Nor has it ever been granted to a person who has exercised a discretionary power. 3 *Bac. Abr.* 535. 2 *Stra.* 881. 892. *Esp. Dig.* 668. 2 *T. Rep.* 338. *Esp. Dig.* 667. 3 *Bac. Abr.* 536. *Andr.* 183. Thus, the writ was refused, where a visitor has exercised his jurisdiction, and deprived a person of his office in a college: 1 *Wilf.* 206. 4 *Com. Dig.* 209. *Andr.* 176. *Esp. Dig.* 667: where commissioners have issued a certificate of bankrupts. 1 *Atk.* 82. 2. *Vez.* 250. 1 *Cook. Bank. L.* 499. And it should be shewn that the inferior court had made default, for the Superior Court will not presume it. *Esp. Dig.* 670. *Bull. N. P.* 199.—Upon the whole of these authorities it appears, that a *mandamus* is founded on the idea of a default; as where an inferior court will not proceed to judgment, or a ministerial officer will not do an act which he ought to do; but there is no instance of a *mandamus* being issued to a judge, who has proceeded to give judgment according to the best of his abilities. It ought, likewise, to be observed, that where a fact is doubtful, a *mandamus* never issues till it is determined by a jury, either on a feigned issue, or on a traverse to the return under the statute: For, how can this court determine what the material fact of the present case is? And if a *mandamus* is issued, what will be the command?—to receive certain evidence, or, at all events, to issue a warrant for apprehending Capt. *Barre?* If, then, the Supreme Court take the matter up, in the way proposed, they must examine the proof of Capt. *Barre's* being a deserter; and so make themselves the *Court competent for this business*, contrary to the express meaning and language of the law.

The Attorney General, in reply, premised, that the Executive of the *United States* had no inclination to press upon the Court, any particular construction of the article on which his motion was founded: but as it is the wish of our government to preserve the purest faith with all nations, the President could not avoid paying the highest respect, and the promptest attention, to the representation of the minister of *France*, who conceived that the decision of the District Judge involved an infraction of the Conventional rights of his Republic. In construing treaties, neither party can claim an exclusive jurisdiction. If either party supposes that there is in the conduct of the other, a departure from the meaning of a treaty, it is the established course in foreign countries, to apply to the government for immediate redress; and, where that application, for any cause, proves ineffectual, the controversy is referred to a negotiation between the powers at variance. In the present case, however, from the nature of the subject, as well as from the

the ſpirit of our political Conſtitution, the Judiciary Depart- 1795.
ment is called upon to decide; for it is eſſential to the inde-
pendence of that department, that judicial miſtakes ſhould on-
ly be corrected by judicial authority. The Preſident, there-
fore, introduces the queſtion for the conſideration of the court,
in order to inſure a punctual execution of the laws; and, at
the ſame time, to manifeſt to the world, the ſolicitude of our
government to preſerve its faith, and to cultivate the friendſhip
and reſpect of other nations.

I. The queſtion is certainly an intereſting and important one: but it ought not to be affected by any circumſtances reſpecting the hardſhip of Captain *Barre's* fate, or the criſis of *French* affairs. If Captain *Barre* ſuffers any injury, he might, on a *Habeas Corpus*, be relieved; and no change or fluctuation in the interior policy of *France*, can releaſe the obligation of our government to perform its public engagements. The caſe muſt, therefore, be conſidered as an abſtract caſe, depending on the fair interpretation of an article in a public treaty. This article contemplates, 1ſt. the arreſt of deſerters from *French* veſſels in our ports—and, 2d. the delivering of thoſe deſerters to the Conſul, that they may be ſent out of the country. The *arreſt* may be made on any kind of proof, the oath of witneſſes*, the confeſſion of the party, or authenticated papers, ſhewing *prima facie*, that the perſon againſt whom the warrant is demanded, belonged to the crew of a *French* ſhip. But *the delivery* is obviouſly a ſubſequent act, to be performed after the party has been brought before the Judge; when, not only the allegations againſt him, but his anſwers and defence, are heard, and the Judge has decided that he is an object of the article. Natural juſtice, and the ſafety of our citizens, require that ſuch a hearing ſhould take place; and it is, indeed, neceſſarily implied in thoſe words of the article "ſaving where the contrary is proved;" which point to a time diſtinct from that of iſſuing the warrant, when the party was not preſent, had not been heard, and could not therefore have *proved the contrary*, even if ſuch proof were in his power; as by ſhewing that he never ſigned the ſhip's roll, or that he had been lawfully diſcharged. Neither principle nor analogy to other caſes, will juſtify a call for the original roll, merely to bring

* WILSON, *Juſtice.* Does it appear that any oath was taken in this caſe?

*Bradford*:—No: A warrant, which had been iſſued by the Diſtrict Judge of *Pennſylvania*—various official letters,—and Captain *Barre's* own ſtatement, were offered to be produced; but the point was put by the Judge on the neceſſity of producing the original roll, in excluſion of every other ſpecies of teſtimony. This, therefore, is the only queſtion before the Court.

1795. bring the party to a hearing, whatever ſtrictneſs of proof may be exacted to warrant his being delivered. In *England* the diſtinction is uniformly recognized: the grounds for iſſuing a warrant are not ſtrong; for finding an indictment they muſt be ſtronger; and for conviction and judgment they are always violent. The conſtruction contended for, in ſupport of the motion, involves no inconveniency; becauſe the Judge muſt receive a reaſonable ſatisfaction before he iſſues his warrant; and before he delivers the deſerter, he may inſiſt on the exhibition of the roll: but the adverſe doctrine is attended with the moſt embarraſſing conſequences. Suppoſe a man deſerts juſt as the veſſel ſails on a diſtant voyage, muſt ſhe return to port? According to the maritime regulations, her Regiſter muſt remain on board; and, in ſuch a caſe, a deſerter could never be ſurrendered. Again:—Suppoſe a *French* veſſel of war takes a prize, puts a part of her crew on board, and ſends the prize to *America*, while ſhe remains herſelf at ſea: the mariners may deſert from the prize with impunity, under the very eye of the miniſter or conſul; as the original roll would continue on board the veſſel of war. If there are ſeveral prizes ſent in, the difficulty is proportionally encreaſed. But all thoſe embarraſſments are avoided by a different interpretation of the article:—by allowing the deſerters to be arreſted, even on a reaſonable ſuſpicion, and to be detained 'till proof of their deſertion can be procured. The detention, however, could not, under ſuch circumſtances, exceed three months, agreeably to the terms of the treaty; and that part of the article ſeems ſtrongly to preſume the veſſel to be abſent at the time of the arreſt, as it provides for his impriſonment until he can be ſent out of the country. On the adverſe conſtruction, likewiſe, the article muſt be deemed to regard as one act, the inſpection of the roll, the iſſuing of the warrant, and the ſurrender of the deſerter; which would operate as a general preſs warrant, and might become dangerous in the extreme to the liberty of the citizens; for, every man bearing a name enrolled upon the ſhip's regiſter, would be liable to be arreſted and put on board a *French* veſſel, if no hearing took place ſubſequent to the arreſt. Still, however, it is clear, that when the article ſpeaks of a conſul's addreſſing himſelf to our courts, it is in order to procure aſſiſtance "to ſend the deſerters back, and tranſport them out of the country;" and not merely to obtain an arreſt: But the queſtion then ariſes, whether, even for the purpoſe of obtaining a delivery of the deſerter, there muſt be an actual production of the regiſter, or ſhip's roll? Is that the only proof which can be allowed, or is it merely the ſpecification of one mode of proof, without excluding other modes? The article provides for a caſe in which there ſhall, peremptorily, be a delivery; but neither

neither in its terms, nor in its nature, does it preclude a delivery in other cases, where the facts are satisfactorily ascertained by other evidence. The inconveniences of that doctrine would be insurmountable. There must be an original roll to produce in every District, into which a deserter should escape. If the roll were burnt, and all the crew desert, nay, if the deserters themselves were to seize upon and destroy the roll, the Judge is not only under no obligation to arrest and deliver them, but he is precluded from doing so. Such a construction, so destructive of the fair advantages of a public compact, ought not to be tolerated. "All civil laws and all contracts in general, (says *Rutherford*, 2 *Inst. B.* 2. *c.* 7. *s.* 8. *p.* 327.) are to be so construed as to make them produce no other effect, but what is consistent with reason, or with the law of nature." It is inconsistent with reason, that a provision intended to guard the contracting parties from the inconveniency of the desertion of their mariners, should, in the very mode of expression, defeat itself; and that interpretation, which renders a treaty null and without effect, cannot be admitted. *Vatt. B.* 2. *c.* 17. *s.* 283. 287. 290. Nor is the common law without an analogy, competent to obviate the difficulty; for, wherever an original is either *a record*, or of *a public nature*, and would be evidence, if produced, an immediate sworn copy will avail. 5 *Wood. p.* 320. *Espinasse.* As, in the instance of the *Cottonian Collection*, whose papers are not allowed to be sent abroad, a copy is always received in evidence; and since a ship's register must, from the nature of the instrument and the rules of the marine, be on board, the reason is, surely, equally cogent, for receiving a copy of it in proof on any judicial enquiry, when the ship is necessarily at a distance. The opposite argument goes, indeed, to exclude stronger testimony than the roll; for a deserter's confession of the fact, before the Judge, would not be sufficient to dispense with the production of the instrument itself. The Constitutions of the *United States* and of the State of *Pennsylvania*, seem to have made no provision (except the former in the case of treason) for a conviction by the confession of the party; yet, the absurdity of proceeding to try a man for a crime, after he has pleaded guilty to the charge, has been too obvious to receive any sanction from the practice of our courts. But that absurdity is urged as law in the present case. Captain *Barre* had confessed the existence of the roll subscribed by him, and his desertion from the ship, still, it is contended, that the Judge must wait for the exhibition of the roll to prove the fact acknowledged;—"to take a bond of fate; and make assurance doubly sure." This, however, would be a mocking of justice—a palpable evasion of the treaty. It is said, that the surrender of deserters is an act odious on principles

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1795. ples of humanity, as well as policy; but the remark is not uniformly juſt. In the caſe of one army giving encouragement to deſerters from another, the ſurrender would be faithleſs and iniquitous; but that bears no analogy to the preſent caſe; and, in another caſe, which is analogous to the preſent, the *United States* have thought it ſo reaſonable and right, that they have directed any deſerter, under contract for a voyage, to be apprehended, and delivered to the Captain of the ſhip—*Act Congreſs, ch.* 29. *ſ.* 7. paſſed 20*th July*, 1790. But the article of the treaty is affirmative, or directory, and not negative; and the diſtinction in conſtruing laws ſo diſtinguiſhed could never be more properly enforced. Thus, though the ſtatute of *Henry* for holding the Quarter Seſſions, preſcribes a particular day, the court being held on another day, it was deemed valid. So, where a day was fixed by the act for appointing overſeers of the poor, the appointment was good, tho' made on another day. Upon the whole, the proof given and tendered in this caſe, was, 1ſt, the warrant of the Diſtrict Judge of *Pennſylvania*, which, on common law principles, would be ſufficient to procure the indorſement or warrant of any other Judge;—2d, the official letters and ſtatement of Captain *Barre*, proving the fact, as concluſively to every purpoſe of truth and juſtice, as the exhibition of his ſignature to the ſhip's roll; and being, in effect, a written confeſſion, a ſpecies of proof which is admitted even in the caſe of treaſon: —and 3d, a copy of the ſhip's roll certified by the Vice-Conſul. This ought not, perhaps, to be regarded as complete evidence under the 5th article of the Convention, which ſeems only to relate to acts made before, or taken in the preſence of, the Conſul. It is, however, entitled to, at leaſt, as much reſpect as a *Notarial Certificate*, which commands full faith in all commercial countries.

II. If, then, the Judge ought not to have refuſed a warrant for apprehending Captain *Barre*, this Court ought to compel him to grant one, by iſſuing a *mandamus*. The general principle of iſſuing that writ, is founded on the neceſſity of affording a competent remedy for every right; and it conſtrains all inferior Courts to perform their duty, unleſs they are veſted *with a diſcretion*. *Eſp.* 3 *Burr.* 1267. The Treaty is the ſupreme law of the land; and if an abſolute diſcretion is given to the Diſtrict Judge, it is conceded, that this Court cannot interpoſe to controul and decide it. But much will depend on the nature of the diſcretion given to the Judge; ſince a legal diſcretion is ſometimes as much implied in the exerciſe of a miniſterial, as in the exerciſe of a judicial function. In the preſent caſe the Treaty contemplates an arreſt, and a delivery of the deſerter: it may, therefore, be conſidered as one thing

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to iſſue the warrant, and as another, very different in nature and jurisdiction, to decide upon a hearing of the parties. In *Stra.* 881, a *mandamus* was refuſed, becauſe the granting of a licence was *diſcretionary* in the Juſtices: but wherever an Act of Parliament peremptorily directs a thing to be done, though it ſhould be of a Judicial nature, if no diſcretion is veſted in the inferior officer or Court, a *mandamus* will lie. Thus, the acts of the Judge of Probates, &c. are judicial acts; yet, as the Act of Parliament declares that adminiſtration ſhall be granted to the next of kin, a *mandamus* will iſſue directing the adminiſtration to be granted to the next of kin, and if it appears on the return that A. B. is next of kin, a *mandamus* will iſſue to grant it to him. 1 *Stra.* 42, 93, 211. If the Diſtrict Judge had returned, that he was of opinion, that Captain *Barre* was not a deſerter, it might have been ſufficient; but he has returned that he would not examine the evidence, becauſe it was not evidence. Suppoſe the ſhip's Roll had been exhibited, and the Judge had refuſed to iſſue the warrant, becauſe it appeared that Capt. *Barre* had taken the oath of citizenſhip, would not a *mandamus* iſſue under ſuch circumſtances? 4 *Burr.* 1991. 2 *Stra.* 992. But iſſuing the warrant is merely a *miniſterial* act, and where words are ſo ſtrongly directory as in the article of the Treaty, without any expreſs inveſtment of diſcretion, a *mandamus* has always been awarded. 1 *Wilſ.* 283. 1 *Black. Rep.* 640. 1 *Stra.* 553. 113. *Doug.* 182. Though the Commiſſioners returned, that they *had reaſon to doubt* (purſuing the words of the law of *Pennſylvania*, 2 *Vol. Dall. Edit. p.* 494) the truth of the Bankrupt's conformity, the Supreme Court at firſt heſitated, whether a *mandamus* ought not to iſſue, though it was eventually refuſed, on the ground of the diſcretion, which the law gave to the Commiſſioners. But one great ingredient in the exerciſe of this controuling juriſdiction, by *mandamus*, is, that there exiſts no other ſpecific remedy for the party, and that upon the principles of juſtice and good government, he ought to have one. 2 *Burr.* 1045. 3 *Burr.* 1266, 1659. 4 *Burr.* 2188. In the preſent caſe, the Diſtrict Judge is the only competent Judge to iſſue the warrant; and a writ of Error cannot be brought merely upon his refuſal to inſtitute the proceſs. 1795.

BY THE COURT: We are clearly and unanimouſly of opinion, that a *mandamus* ought not to iſſue. It is evident, that the Diſtrict Judge was acting in a judicial capacity, when he determined, that the evidence was not ſufficient to authorize his iſſuing a warrant for apprehending Captain *Barre*: and (whatever might be the difference of ſentiment entertained by this Court) we have no power to compel a Judge to decide according to the dictates of any judgment, but his own. It is unneceſſary,

1795. unneceſſary, however, to declare, or to form, at this time, any concluſive opinion, on the queſtion which has been ſo much agitated, reſpecting the evidence required by the 9th article of the Conſular Convention.

The Rule diſcharged.

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PENHALLOW, *et al. verſus* DOANE'S *Adminiſtrators.*

THIS was a Writ of Error, directed to the Circuit Court for the Diſtrict of *New-Hampſhire*. The caſe was argued from the 6th to the 17th of *February*; the Attorney General of the *United States*, *(Bradford)* and *Ingerſoll*, being Counſel for the Plaintiffs in error; and *Dexter*, *Tilghman* and *Lewis*, being Counſel for the Defendants in error.

The Caſe, reduced to an hiſtorical narrative, by Judge *Paterſon*, in delivering his opinion, exhibits theſe features:

"This cauſe has been much obſcured by the irregularity of the pleadings, which preſent a medley of procedure, partly according to the common, and partly according to the civil, law. We muſt endeavour to extract a ſtate of the caſe from the Record, Documents, and Acts, which have been exhibited.

It appears, that on the 25th of *November*, 1775 *(1 Jour. Congreſs*, 259*)* Congreſs paſſed a ſeries of Reſolutions reſpecting captures. Theſe Reſolutions are as follow:

"Whereas it appears from undoubted information, that many veſſels, which had cleared at the reſpective Cuſtom-houſes "in theſe Colonies, agreeable to the regulations eſtabliſhed by "Acts of the *Britiſh* Parliament, have, in a lawleſs manner, "without even the ſemblance of juſt authority, been ſeized by "his Majeſty's ſhips of war, and carried into the harbour of "*Boſton*, and other ports, where they have been rifled of their "cargoes, by order of his Majeſty's naval and military officers, "there commanding, without the ſaid veſſels having been pro-"ceeded againſt by any form of trial, and without the charge of "having offended againſt any law.

"And whereas orders have been iſſued in his Majeſty's "name, to the commanders of his ſhips of war, to proceed as "in the caſe of actual rebellion againſt ſuch of the ſea-port "towns and places being acceſſible to the king's ſhips, in "which any troops ſhall be raiſed or military works erected, "under